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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1114.

KATHERINE ANN ARKEY,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

The State Court has not decided a federal question of substance not theretofore determined by this Court, nor has the State court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

QUESTION PRESENTED.

Whether petitioner has been deprived of the right to trial and due process of law by the refusal of the trial court to permit her to withdraw her plea of guilty to an indictment when the record does not support her claim that at the time of entering such plea she did not understand the nature and consequence of such plea.

STATEMENT OF THE CASE.

Katherine Ann Arkey was indicted for the crime of manslaughter in the first degree (Ohio Revised Code Section 2901.06), the indictment charging that on February 26, 1966 she unlawfully killed Anthony Galish. On March 29, 1966, at arraignment, she entered a plea of not guilty.

On July 18, 1966, the petitioner with her counsel appeared before the trial court and withdrew her plea of not guilty and entered a plea of guilty to the indictment. At the request of counsel, the court referred the matter to the Probation Department and to the Psychiatric Clinic for investigation and report and passed the case for sentence. The court received the psychiatric report on October 14, 1966.

On November 17, 1966, the petitioner filed a motion for an order permitting her to withdraw her plea of guilty and to have the matter set for hearing before a jury. Said motion was accompanied by an affidavit of the petitioner. The case came on for sentencing before the court on November 28, 1966, defendant and her counsel being present. The court overruled the motion to withdraw the plea of guilty and sentenced the petitioner to the Ohio State Reformatory for Women. The petitioner was continued on the same bail pending appeal. The Court of Appeals for Cuyahoga County, Ohio, affirmed the judgment of the trial court. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

ARGUMENT.

No substantial federal question is presented in the refusal of the trial court to permit the petitioner to withdraw her plea of guilty, which she admits was made with the assistance of counsel and after warning by the trial court that by pleading guilty she might thereby be waiving her constitutional rights. Petitioner's claim that she was not accorded Due Process and the right to trial in the Ohio courts is based on her assertion that when she made the plea she did not fully understand that she might be sentenced to imprisonment.

The petitioner has not filed in her appeals in the Ohio courts any transcript of the proceedings before the trial court on the plea and sentencing. The statement in the petition of "Facts Material to the Consideration of the Questions Presented" is not supported by anything in the files in this case other than her affidavit in support of her written motion to withdraw her plea, which reads:

> "KATHERINE ANN ARKEY, being first duly sworn, deposes and says that she is the defendant herein; that she has heretofore entered a plea of 'Guilty' in this action; that at that time and prior thereto, both counsel and the Court explained in detail her right to a trial; that nevertheless, at the time she entered her plea, she was distraught with worry and did not fully understand the enormity of the possible consequences of entering her plea; and that she respectfully prays the Court to give this defendant her day in Court."

The proceedings on the plea, taken from a transcript prepared by the official court reporter, are as follows :

> "Mr. Friedman: If the Court please, this is the case of Katherine Ann Arkey. Defendant stands before the Court under indictment for manslaughter in the first degree, Revised Code 2901.06, represented

by Frank Spiegel. Thorough discussion has been had with Mr. Spiegel and after said discussion it is my understanding at this time this defendant wishes to withdraw her plea of not guilty of the charge contained in the indictment and enter a plea of guilty as charged.

The Court: Mr. Spiegel.

Mr. Spiegel: Your Honor, that is correct, as the prosecutor just set forth.

* * *

Mr. Friedman: Miss Arkey, would you step forward?

The Court: The Court's remarks are addressed to the defendant.

You are represented in this case by eminent and able counsel, well qualified to protect your interest in every respect. However, there are certain things that the Court as a matter of policy—should be asked directly from the defendant.

* * *

The Court: The Court's remarks are addressed to the defendant. I will ask you certain questions. Consider your answer carefully for by them you may waive constitutional rights that are established by law for your protection. You should not waive these rights unless it is in your own best interest to do so.

Did you receive a copy of the indictment in this case in which you are charged with manslaughter in the first degree?

The Defendant: Yes, sir.

The Court: You know that you are entitled to a jury trial in this case, or if you refer, to a trial by a judge without a jury.

The Defendant: Yes.

Mr. Spiegel: Speak up so the court reporter can hear you.

The Court: You know you are entitled to a full, fair and impartial trial whether by a judge or a jury.

The Defendant: Yes.

The Court: You know that the statutory penalty for the charge of manslaughter in the first degree is one to twenty years in the Ohio State Reformatory for Women.

The Defendant: Yes.

The Court: Having this in mind, is it, nevertheless, your desire and request for permission to withdraw your plea of not guilty formerly entered to the charge placed against you by the indictment and for permission to enter a plea of guilty to the charge in the indictment, the same being for the offense of manslaughter in the first degree under Section 2901.06 of the Revised Code?

The Defendant: Yes.

The Court: Are you doing this of your own free will?

The Defendant: Yes.

The Court: Are you doing this of your own free act and deed?

The Defendant: Yes.

The Court: You understand that as yet the Court has made no decision regarding its possible sentence, has given no indication to your counsel as to what the sentence may or may not be.

The Defendant: Yes.

The Court: Such being the case, entry is made as follows:

Defendant in open court with her attorney present, and being advised of her constitutional rights, and on recommendation of the prosecutor, is permitted to withdraw her plea of not guilty as charged of manslaughter in the first degree, Section 2901.06 of the Revised Code.

The Court's remarks are again addressed to the defendant. How do you plead with reference to the charge of manslaughter in the first degree?

The Defendant: Guilty.

The Court: Let the record so indicate.

Mr. Spiegel, I feel that an investigation and presentence report by the Probation Department would be of help in making final disposition of the case.

Mr. Spiegel: I would so request, your Honor, referral to the Probation Department.

The Court: Very well. Defendant will be continued on the same bond."

In this case, before pronouncing sentence, the trial court conducted a hearing on the motion to withdraw the plea of guilty, at which the petitioner and her counsel were present. The transcript above mentioned shows that the court overruled the motion, stating:

"The Court: The Court has considered this motion and the evidence submitted therewith and the arguments of counsel. Under the circumstances the Court feels that the motion should be overruled. It is, therefore, overruled."

The court then heard further arguments of counsel and a plea by the petitioner herself that she be granted probation. The basis of petitioner's plea was the likelihood of hardship to her family should she not be granted probation. The following remarks of the trial court in pronouncing sentence, taken from the court reporter's transcript, are pertinent to petitioner's claim of clear abuse of discretion amounting to a denial of Due Process:

"The Court: First, let the record show that the defendant is here for sentencing. The Court has reviewed the presentence report of the Probation Department with a psychiatric report, which was obtained under Section 2951.03 of the Revised Code and which, therefore, is a part of the presentence report.

This has been discussed at length with counsel for the defendant on several occasions.

At this time I wish to tell the defendant that the law provides that prior to sentencing the defendant

has the opportunity to make any statement she wishes to the Court.

I will say that this matter has been discussed thoroughly with defendant's counsel and defendant's counsel will have an opportunity to make any statements he feels desirable on behalf of the defendant before sentencing, but at this particular time the Court does ask the defendant whether she has anything to say prior to sentencing.

* * * * *

"The Court: Well, thank you, counsel, for your remarks, which, as I have indicated, have given the Court great concern.

However, the crime involved here was first degree manslaughter, no more and no less. While the Court has sympathy and concern for the defendant's husband and children, this sympathy and concern cannot be the controlling features in this case.

The Court has also sympathy and concern for the deceased and for the deceased's parents. Those, too, are not controlling in this situation.

It is with utmost regret and greatest concern that the Court has observed the number of child beatings that have come to the light in the past years and this must be reversed, and the Court intends to do everything in its power to bring about the necessary reversal. This element and phase of the case is one of more or less compelling considerations that the Court sees here.

The Court, therefore, sentences the defendant to the Ohio State Reformatory for Women at Marysville, Ohio."

As to change of plea, Section 2943.03, Revised Code of Ohio, provides in part as follows:

"The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial."

The allowance of a change of plea is therefore within the sound discretion of the trial court. See paragraph two of the syllabus of *State v. Frohner,* 150 Ohio St. 53. Although such discretion should be liberally exercised in favor of the accused, nowhere in the present situation does it appear that there was any abuse of discretion by the trial court. The defendant was represented by competent counsel of her own choosing. The trial judge with deliberate care explained her statutory and constitutional rights to the defendant, and then prior to sentencing, the judge conferred with defendant's counsel on several occasions with regard to the probation and clinic reports. There is not a shred of proof that any promises or inducements were offered petitioner to enter her plea of guilty or of any mistake, misconception of the nature of the charge, misrepresentation or misunderstanding of its effects.

It is apparent from the petition that what the petitioner really sought in connection with her request to allow a change of plea was the certainty of probation. There is no indication that her request flowed from any real desire to have her case submitted to a jury on the merits. The administration of justice does not countenance the right of a person who formally declares his guilt to gamble with the law by pleading guilty in the expectation of receiving a suspended or a light sentence and then demanding as his right a withdrawal of his guilty plea when the sentence is greater than he expected. *State v. Martin,* 158 N. E. 2d 414. It is fundamental that probation, being a matter resting wholly within the discretion of the trial court, is not a matter with which the reviewing court can interfere.

The state courts of Ohio having reviewed and decided the factual issue of whether at the time of entering her plea of guilty the petitioner understood the nature

and consequences of such plea, this question is not open for reconsideration by this Court. *Hoag v. New Jersey*, 356 U. S. 464, 471, 2 L. ed. 2d 913, 920, citing *Watts v. Indiana*, 338 U. S. 49, 50, 51, 93 L. ed. 1801.

CONCLUSION.

The petition, in effect, asks the Court to enter the domain of the proper apportionment of punishment by reviewing her sentence imposed by a state court. The claim that peculiar circumstances facing the petitioner served to make her plea involuntary is not supported in the record, and the Ohio courts have so held. There is therefore nothing for this Court to consider in connection with the petitioner's claim that she should have been permitted to withdraw her plea of guilty and be given another day in court.

The petitioner not having shown any deprivation of constitutional rights entitling her to review by this Court, the writ should be denied.

Respectfully submitted,

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